

**REDACTED VERSION - UBER TECHNOLOGIES, INC.'S OPPOSITION TO
PLAINTIFF'S MOTION IN LIMINE**

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**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

In re:

ANTHONY SCOTT LEVANDOWSKI,

Debtor.

ANTHONY SCOTT LEVANDOWSKI, an
individual,

Plaintiff,

v.

UBER TECHNOLOGIES, INC.

Defendant.

Case No. 20-30242 (HLB)

Chapter 11

Adv. Pro. No. 20-03050 (HLB)

**UBER TECHNOLOGIES, INC.'S
OPPOSITION TO PLAINTIFF'S
MOTION *IN LIMINE* TO EXCLUDE
EVIDENCE AND ARGUMENT IN
SUPPORT OF UBER'S EQUITABLE
INDEMNITY COUNTERCLAIMS**

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Uber Technologies, Inc. (“**Uber**”) respectfully submits its Opposition to Anthony Levandowski’s *Motion In Limine To Exclude Evidence And Argument In Support Of Uber’s Equitable Indemnity Counterclaims* [Dkt. 413] (the “**Motion**”), and represents as follows:

I. INTRODUCTION

Levandowski’s Motion asks this Court to bar Uber from presenting evidence or argument in support of Uber’s counterclaims for equitable indemnity and contribution (Counterclaim Counts VII and IX) on the basis that Uber allegedly did not disclose the amounts it seeks to recover on account of these claims and cannot prove its claims in any event. The Motion should be denied for three reasons.

First, Uber did in fact properly disclose the amounts and categories of damages it seeks to recover multiple times and in multiple ways over the course of this proceeding. Starting with its Counterclaims, and including in its Rule 26(a) Disclosures, its Interrogatory Answers, its document productions and at depositions, and its responses to Levandowski’s two unsuccessful summary judgment motions seeking to dismiss both equitable indemnity claims, Uber has told Levandowski it seeks to recover the amounts Uber paid (i) to settle its litigation with Waymo LLC (“**Waymo**”) (\$250 million) and (ii) to satisfy Google LLC’s (“**Google**”) joint and several liability judgment against Levandowski’s co-defendant, Lior Ron (\$9,735,708.10).

As set forth herein, Levandowski’s feigned complaints with Uber’s disclosure go not to the fact that Levandowski does not know exactly the maximum amount of the judgment Uber asks this Court to award or the facts Uber contends support its claim. Instead, Levandowski’s argument is about the fact that Uber has argued that, *at a minimum*, the appropriate apportionment of liability to Levandowski is 90% of the Waymo settlement and 80% of the Google settlement. According to Levandowski, by arguing that if the Court attributes any fault to Uber, it still should attribute most of the fault to Levandowski, Uber has somehow not fully disclosed “each category” of its damages to Levandowski as required by Rule 26(a) of the Federal Rules of Civil Procedure. Levandowski never explains (because he cannot do so) how this argument could impact his defense strategy in any way. So instead he argues that because Uber has not offered an expert witness to support a reduced allocation, the Court should bar Uber’s equitable indemnity claim altogether. But no expert is required here. How to allocate fault is the ultimate fact question that this Court, and not an expert, must decide

1 based on the evidence of what Levandowski did. And on that score, Uber will present substantial
2 evidence, including Levandowski's criminal conviction and other admissions, to demonstrate that
3 Levandowski should be assigned all or almost all of the responsibility for the settlement consideration
4 Uber paid to Waymo and Google. Uber also will present testimony and documentary evidence that
5 Waymo and Uber agreed in arm's length negotiations that Uber would provide \$250 million of
6 consideration and further agreed that the stock Waymo received was worth \$250 million.

7 **Second**, Levandowski's Motion also should be denied because he asks this Court to weigh the
8 sufficiency of Uber's evidence and decide the claims summarily on the merits through motion practice.
9 This is not a proper use of a motion *in limine*. *Elliott v. Versa CIC, L.P.*, 349 F. Supp. 3d 1000, 1002
10 (S.D. Cal. 2018). Instead, motions *in limine* are intended to streamline trials by deciding pure legal
11 questions about the relevancy of proposed evidence or by addressing whether proposed evidence is
12 admissible under the Federal Rules of Evidence. Because Levandowski's Motion raises neither type
13 of issue (and in fact repeats arguments he made in his failed summary judgment motions), his Motion
14 should be denied.

15 **Finally**, although the Court should not begin the process of weighing the evidence until the
16 trial is concluded, as set forth herein and in Uber's *Trial Brief* [Dkt. 404], Uber will present substantial
17 admissible evidence in support of its request that the Court apportion to Levandowski most, if not all,
18 of the fault for the allegations in the Waymo litigation and the Google arbitration and that Levandowski
19 be ordered to indemnify Uber for the amounts Uber was required to pay to Waymo and Google to
20 resolve those disputes plus attorneys' fees.

21 **II. ARGUMENT**

22 **A. Levandowski's Disclosure Arguments Are Without Merit.**

23 **1. Uber Disclosed In Multiple Ways The Amounts It Seeks To Recover On** 24 **Account Of Its Equitable Indemnity Claims.**

25 Relying upon inapposite case law, Levandowski incorrectly contends that Uber has failed to
26 properly disclose the amounts it seeks to recover on account of its equitable indemnity and contribution
27 claims and that Levandowski will somehow be prejudiced if these claims are allowed to go forward at
28 trial. (Motion at 2-4.) But the fact that Levandowski has devoted most of his Motion to explaining

1 why the evidence does not support Uber's proposed apportionment of the two settlements it paid
2 (Motion at 4-10), belies Levandowski's claims of surprise and prejudice.

3 In fact, there is no secret here about the total amounts Uber paid to Waymo and Google on
4 account of Levandowski's wrongful conduct. Starting with its Counterclaims, Uber made specific
5 allegations setting forth the amounts it paid that should be apportioned to Levandowski and the reasons
6 why. In Counterclaim VII, Uber alleged that it was seeking contribution for the consideration it paid
7 to settle the Waymo litigation which had been publicly reported as approximately \$245 million. (Dkt.
8 64 at ¶164.)¹ In Counterclaim IX, Uber alleged that it paid \$9,453,135.87 to resolve the portion of the
9 Google Arbitration Award that was found to be joint and several as between Ron and Levandowski
10 and that it held an assignment of Ron's contribution rights against Levandowski. (*Id.* at ¶¶190, 192.)

11 In its Rule 26(a) disclosures, Uber again disclosed the amounts it wanted apportioned to
12 Levandowski, stating:

13 Uber is seeking the following damages in this action at this time. Uber's
14 investigation continues.

- 15 a. Compensatory and consequential damages for defense costs
16 that Uber incurred in the Waymo Litigation and approximately
17 \$245,000,000 for the consideration that Uber provided to settle
18 the Waymo Litigation;
- 19 b. Contribution from Levandowski for the consideration valued
20 at approximately \$245,000,000 that Uber provided to settle the
21 Waymo Litigation;
- 22 c. Compensatory and/or rescissory damages for the funds that
23 Uber advanced to Levandowski to cover defense costs in the
24 Google Arbitration;
- 25 d. Contribution for at least 50% of the approximately \$9.5
26 million that Uber paid on behalf of Lior Ron ("Ron") for the
27 joint and several portion of the Google Arbitration Award;
- 28 e. Attorneys' fees and costs incurred by Uber in defending this
action, including fees incurred in the Bankruptcy proceeding;
and

¹ Uber's Counterclaims and Disclosures stated that Waymo received "approximately \$245 million," because that amount had been publicly reported, *see, e.g.*, <https://www.reuters.com/article/us-alphabet-uber-trial/waymo-accepts-245-million-and-ubers-regret-to-settle-self-driving-car-dispute-idUSKBN1FT2BA>. However, as the evidence at trial will demonstrate, the exact amount is \$250 million, as stated in the Settlement Agreement and Uber's interrogatory answer.

1 f. Prejudgment and post judgment interest on any amounts
2 awarded to Uber in this action.

3 (Uber's Initial Disclosures Pursuant to Rule 26(a)(1), Motion, Ex. J at 10-11.)

4 In addition, Uber provided Levandowski with a six-page response to Levandowski's
5 interrogatory asking Uber to

6 [e]xplain in detail the basis for Uber's demand that Levandowski
7 contribute to any payment made by Uber under the Waymo Settlement
8 Agreement and/or any offset Uber is entitled to, including stating the
9 amount paid, the date Uber made the payment, the amount Uber seeks
from Levandowski and/or the amount Uber claims as an offset, and
providing all factual bases that support your claim for contribution
and/or offset.

10 (Uber's Response to Plaintiff's Sixth Set of Interrogatories, Motion, Ex. C at 3, Interrogatory No. 11.)

11 In that answer, Uber set forth the legal authority that supports its equitable indemnity claim and
12 explained that [REDACTED]

13 [REDACTED]
14 [REDACTED] (*Id.* at 3-4.) Uber then detailed the evidence it would present to show
15 that the allegations in Waymo's lawsuit "were based not on Uber's own intentional misconduct, but
16 rather on intentional misconduct committed by Mr. Levandowski." (*Id.* at 4-9.) Uber further stated
17 that it would ask the Court to find that Levandowski was at least 90% at fault and liable for at least
18 \$225 million of the consideration Uber paid to Waymo. (*Id.* at 9.)

19 Uber also provided evidence of its payments to Waymo and Google in document discovery,
20 producing: (i) the stock issuance agreement [REDACTED]

21 [REDACTED]
22 [REDACTED] (ii) the wire transfer advice reflecting Uber's
23 payment of \$9,735,708.10 to Google to settle the joint and several portions of the Google Arbitration
24 Award (UBER-AL00003045); and (iii) the agreement between Ron and Uber assigning Ron's
25 contribution claims against Levandowski to Uber (UBER-AL00000217). The Waymo Settlement
26 Agreement also was produced in this case as evidenced by the fact that it has been provided to the
27
28

1 Court on multiple occasions in connection with various motions filed by the parties, including
2 Levandowski's motion for summary judgment based on its terms. (*See* Dkt. 192.)

3 Levandowski also served a Rule 30(b)(6) deposition notice seeking testimony about:
4 "Negotiations with Waymo and Google regarding Levandowski, including negotiations to settle the
5 Prior Litigation and whether Uber communicated to Google or Waymo any of the proposals or
6 constructs made by Levandowski to Uber regarding a global settlement of the Prior Litigation."
7 (Levandowski Rule 30(b)(6) Notice, Ex. A, attached hereto, at 8-9.) "Prior Litigation" is defined as
8 the "Google Arbitration and Waymo Litigation." (*Id.* at 6.)

9 Uber produced Cameron Poetzsch as its Rule 30(b)(6) witness to testify on this topic and he
10 testified about the negotiations that led to the Waymo settlement. (Poetzsch Dep., Ex. B, attached
11 hereto, at 23, 29-42.) At Lior Ron's deposition, Levandowski's counsel asked Ron questions about the
12 assignment agreement. (Ron Dep., Ex. C, attached hereto, at 161-63.) Levandowski thus had the
13 opportunity to ask about Uber's payments to Google and Waymo, including how the dollar amount of
14 \$250 million was negotiated and how Waymo and Uber valued the stock that Uber transferred to
15 Waymo under the Waymo Settlement Agreement.

16 Further, the discovery in this adversary proceeding has focused on the very reasons that Uber
17 contends Levandowski is responsible for most of the amounts Uber paid to Waymo and Google in the
18 settlements: Levandowski's admitted criminal trade secret theft and his admitted failure to tell Uber
19 about his secret funding and control of Tyto. The basis for allocation consists primarily of the evidence
20 presented in the Waymo case and in the Google arbitration; not only has that record been available to
21 Levandowski's counsel, but his current counsel, the Goodwin firm, was counsel of record in both the
22 arbitration (for Levandowski) and in the Waymo litigation (for Otto Trucking).

23 Finally, when Levandowski moved for summary judgment on Uber's contribution claims,
24 Uber submitted the payment documents it produced in discovery to support its opposition. (Dkt. 151
25 at Exs. U-6, U-46, U-50, U-51, U-75.) And because Levandowski unsuccessfully challenged the
26 contribution claims in *two separate motions*, Uber explained in its two separate response briefs that it
27 was seeking "contribution from Mr. Levandowski for the \$250 million Uber paid to settle the Waymo
28 Litigation, and for the roughly \$9 million it paid to cover the portion of the Award that was joint and

1 severable against Mr. Levandowski and Mr. Ron.” (Dkt. 149 at 18; *see also* Dkt. 148 at 5-6.) When
2 the Court denied Levandowski’s summary judgment motion, it also described the claims as seeking
3 equitable indemnity and contribution respectively for the amounts Uber paid to Waymo under the
4 Waymo Settlement Agreement and paid on behalf of Ron to settle Google’s arbitration award. (Dkt.
5 344 at 53-54.)

6 In sum, the record establishes that Uber has fully disclosed the amounts it is seeking on account
7 of its equitable indemnity and contribution claims and the factual basis for those claims. Accordingly,
8 there is absolutely no basis for this Court to bar Uber from introducing evidence in support of those
9 claims at trial.

10 **2. Because Uber Disclosed The Amounts It Is Seeking To Recover On Account**
11 **Of Its Equitable Indemnity And Contribution Claims, Levandowski**
Cannot Establish That He Has Suffered Any Prejudice Whatsoever.

12 Because Uber produced substantial information to Levandowski about its equitable
13 indemnification claims and Levandowski had the opportunity to take discovery on those claims, he
14 cannot establish that he has suffered any prejudice at all and certainly not the type of prejudice that
15 would justify the drastic relief he seeks. Tellingly, Levandowski cannot point to anything that he did
16 not know about Uber’s equitable contribution claims that now comes as a surprise. Instead he raises
17 two complaints, neither of which has merit.

18 *First*, Levandowski argues that he might have hired an expert if he knew that Uber was seeking
19 to apportion fault for most of the Waymo and Google settlements to him. (Motion at 10-11.) That
20 argument is incredible in light of the record in this case. For starters, if Levandowski thought expert
21 testimony was required to apportion fault, he should have hired an expert because he knew from day
22 one that Uber sought to shift liability for all of what it paid to Waymo and Google to him. In
23 paragraphs 166 and 192 of its Counterclaims, Uber pleads that *all* of the Waymo and Google
24 settlement payments should be allocated to Levandowski. (Dkt. 64 at ¶¶166, 192.) The fact that Uber
25 has lowered its request from 100% of both settlement payments to 90% (Waymo) and 80% (Google)
26 does not change the fact that Levandowski was on notice he would be required to present evidence
27 that he was not significantly at fault for the events that forced Uber to settle these claims. Therefore,
28 if Levandowski thought that his defense required expert testimony (which it does not), he could and

1 should have hired an expert on that topic.

2 In addition, Levandowski also knew that Uber's accounting expert, Melissa Bennis, performed
3 a mathematical calculation to establish that, if the Court accepts Uber's evidence on the allocation of
4 fault, it is Levandowski, and not Uber, that would owe the resulting net judgment even in the highly
5 unlikely event that Levandowski prevailed entirely on his indemnification claim. (Motion at 5.) If
6 Levandowski thought an expert's opinion was necessary to rebut Ms. Bennis's mathematical
7 calculation, he could have offered a rebuttal expert, as he did when he submitted the expert report of
8 Carl Saba to address other aspects of Ms. Bennis's report.

9 Similarly, if Levandowski thought he had a case to make that Uber was not entitled to equitable
10 indemnity for the Waymo settlement in the amount of \$250 million because the stock transferred to
11 Waymo was worth less than \$250 million, nothing prevented Levandowski from developing such
12 evidence through his own expert testimony or by examining Uber's and Google's witnesses about this
13 value. In short, if Levandowski wanted to present expert testimony on this issue, nothing stopped him
14 from doing so.²

15 **Second**, in tacit recognition that nothing prevented him from presenting expert testimony on
16 these issues, Levandowski attempts to make what amounts to a "gotcha" argument in order to shift the
17 focus to Uber. He incorrectly contends that Uber was required to present expert testimony about the
18 stock's value in the first instance and that because Uber did not do so, it must forfeit its claim even if
19 it has other admissible evidence to support that value. But "expert witness testimony is not required
20 for a showing of damages; instead, fact witness testimony can suffice." *Apple, Inc. v. Samsung Elecs.*
21 *Co., Ltd.*, 11-CV-01846-LHK, 2012 WL 2571719, at *28 (N.D. Cal. June 30, 2012) (accepting party's
22 argument that expert testimony on damages was not required). Thus, Uber's "lack of expert testimony"
23 on this issue is "not dispositive"; a party may prove its damages by relying on fact evidence, as Uber

24
25 ² Levandowski also complains that Uber initially stated that it might produce an expert to demonstrate that the stock was
26 worth more than \$250 million. (Motion at 4.) Uber ultimately elected not to do so (just as Levandowski promised experts
27 on certain issues and did not produce them). Uber's election to stand on the \$250 million value for the stock, however, in
28 no way prejudiced Levandowski because, unlike with Levandowski's alleged consequential damages claim (where he
promised an expert to quantify the claim), (a) Levandowski was told from day one that Uber's position was that the stock
was worth at least \$250 million, and (b) Uber produced documents and a witness to answer questions about the settlement
negotiations through which the \$250 million settlement value was agreed upon—at arm's length between Uber and
Waymo.

1 intends to do in the case of its equitable contribution claims. *Plexxikon Inc. v. Novartis Pharm. Corp.*,
2 17-cv-04405-HSG, 2021 WL 2577536, at *8 (N.D. Cal. June 23, 2021) (denying motion *in limine*
3 seeking to bar non-expert testimony on damages); *Weaver v. U.S. Dept. of Agric., Forest Serv.*, 10-
4 CV-01523-AWI, 2013 WL 144974, at *7 (E.D. Cal. Jan. 11, 2013) (rejecting defendant’s argument
5 that plaintiff could not prove damages without expert report quantifying damages). (Uber’s factual
6 evidence is described in Section C, *infra*.) Accordingly, the fact that Uber did not hire an expert to
7 value the stock does not mean that Uber cannot proceed on its claims or that Levandowski was
8 somehow prevented from presenting his own expert testimony.

9 Levandowski also cannot claim prejudice here because expert testimony on the fact question
10 of how fault should be allocated is not required and, in any event, likely would not have been permitted
11 had Levandowski (or Uber) sought to present such testimony. An expert “is generally not permitted
12 to opine on an ultimate issue of fact” because “such opinions may ‘invade the province of’ the [trier
13 of fact].” *Berman v. Freedom Fin. Network, LLC*, 400 F. Supp. 3d 964, 971 (N.D. Cal. 2019); *accord*
14 *Little Oil Co., Inc. v. A. Richfield Co.*, 852 F.2d 441, 446 (9th Cir. 1988) (affirming exclusion of expert
15 opinion that improperly instructed trier of fact how to weigh the “ultimate facts in question”); Fed. R.
16 Evid. 704, Advis. Comm. 1972 Note (“The abolition of the ultimate issue rule does not lower the bars
17 so as to admit all opinions” on the ultimate issue, and such opinions should be excluded if they “merely
18 tell the jury what result to reach”).

19 Here, as Levandowski acknowledges, the question of how much of the fault should be allocated
20 to Levandowski is the ultimate question of fact that *this Court*, as the finder of fact, must decide. (*See*
21 *Motion at 2-3.*) Thus, an expert opinion telling this Court how to rule on that question would likely
22 not be admissible and therefore, certainly is not required. For that reason, it is not surprising that none
23 of the equitable indemnity decisions that Levandowski cites holds that a party seeking equitable
24 indemnity *must* offer expert testimony to support its allocation of fault or be subject to summary
25 rejection of its claim. (*See Motion at 2-3.*) For example, Levandowski cites *Baird v. Jones*, 21 Cal.
26 App. 4th 684, 687-88, 693 (4th Dist. 1994). In that decision, the appellate court upheld an award of
27 equitable indemnity, which was based on the *trial court’s* determination of which defendant was
28 responsible for the underlying judgment. The decision contains no suggestion that the trial court

1 received expert testimony on the question before deciding who was at fault or that expert testimony is
2 required to prove a claim for equitable indemnity under California law. Similarly, in *Pilot Catastrophe*
3 *Services, Inc. v. Manuel*, the district court entered a default judgment granting an equitable indemnity
4 claim and apportioned fault without requiring expert testimony. 20-cv-1083-TLN-DMC, 2021 WL
5 4261499, at *7-9 (N.D. Cal. Sept. 20, 2021), *report and recommendation adopted*, 2021 WL 5112996
6 (E.D. Cal. Nov. 3, 2021). None of the other equitable indemnification decisions that Levandowski
7 string-cites requires a party seeking equitable indemnification to present expert testimony on how fault
8 should be apportioned. (*See* Motion at 2-3.)

9 In sum, Levandowski has not shown what it is that Uber did not disclose to him or how this
10 unidentified lack of disclosure has in any way prejudiced Levandowski. Accordingly, the Court should
11 deny Levandowski's Motion.

12 **B. Levandowski's Motion Is Not A Proper Motion *In Limine*.**

13 Levandowski's Motion also should be denied because it is not a proper motion *in limine*. "A
14 motion *in limine* 'is not a proper vehicle for a party to ask the Court to weigh the sufficiency of the
15 evidence to support a particular claim or defense, because '[t]hat is the function of a motion for
16 summary judgment, with its accompanying and crucial procedural safeguards.'" *Elliott*, 349 F. Supp.
17 at 1002 (quoting *Bowers v. National Collegiate Athletic Ass'n*, 563 F. Supp. 2d 508, 532 (D. N.J.
18 2008)); *accord Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, 2:16-cv-02322-AB, 2017 WL
19 11489792, at *1 (C.D. Cal. Nov. 15, 2017). Instead, the proper use of an *in limine* motion is "to exclude
20 inadmissible evidence before it is introduced at trial." *Elliott*, 349 F. Supp. at 1001.

21 *Elliott* is instructive. In that case, defendants moved to "preclude nonplausible claims," *id.* at
22 1003, and reargued the points that they had made in an unsuccessful summary judgment motion, *id.*
23 at 1002. In denying the motion, the court also rejected defendants' arguments that certain claims were
24 not disclosed, noting that it was "unclear to the Court how a claim purportedly not pleaded in this
25 lawsuit was nevertheless a claim on which Defendants moved for summary judgment." *Id.* at 1003.

26 Levandowski's Motion suffers from the same defects as the motion in *Elliott*. Like the
27 defendants in *Elliott*, Levandowski asks this Court to weigh the evidence, devoting most of his Motion
28 to his arguments about why he should not be liable to Uber for either the Waymo or Google

1 settlements. (Motion at 4-10). But how much of the fault is Levandowski's, as opposed to Uber's, is
2 the very factual issue this Court must decide after hearing the evidence. Simply put, Levandowski's
3 Motion must be denied because it does not ask this Court to reject evidence on the grounds that it is
4 legally irrelevant or inadmissible under the Federal Rules of Evidence. Instead, it asks the Court to
5 decide the ultimate fact question in Levandowski's favor summarily based solely on his one-sided
6 presentation of the facts.

7 Further, like the defendant in *Elliot*, Levandowski professes ignorance of issues he previously
8 argued and lost when the Court declined to grant summary judgment dismissing Uber's equitable
9 indemnity claims. When he moved for summary judgment on the equitable indemnity claims,
10 Levandowski made the same argument he now makes in this Motion: that Uber has not shown that the
11 stock it transferred to Google was worth \$250 million. (*Compare* Motion at 4 ("Uber failed to present
12 any expert opinion testimony as to the value of the Waymo Settlement consideration") with Dkt. 175
13 at 13 n.8 ("Uber seeks \$250 million for the amounts it paid in the Waymo Settlement, but the Waymo
14 Settlement provided for payment in the form of preferred stock at Uber, not money....Uber provides
15 no legal basis for seeking contribution for the stock it issued pursuant to the Waymo Settlement.")
16 Having already made this argument and lost, Levandowski is not entitled to raise this argument again
17 before trial and in any event, certainly should not be heard to complain that he did not know the
18 amounts Uber was seeking on account of its equitable indemnity claims.

19 **C. Uber Has Admissible Evidence To Support Its Equitable Indemnity And**
20 **Contribution Claims.**

21 Ignoring the fact that (a) he was criminally convicted of theft of the confidential information
22 that was at the heart of the Waymo litigation and (b) that he was held jointly and severally liable with
23 Ron for the amounts Uber paid to Google, Levandowski argues that there is supposedly *no* evidence
24 that he should be held responsible for any of the amounts Uber paid to Waymo or Google. (Motion at
25 5-10.) This remarkable argument is wholly misplaced in a motion *in limine* particularly given, as
26 discussed above, the Court has already denied Levandowski's summary judgment motions seeking to
27 dismiss Uber's equitable indemnity claims. In any event, although the Court need not and should not
28 weigh the evidence in the context of a motion *in limine*, the record demonstrates that Uber has ample

1 evidence to support its equitable indemnity claims.

2 **First**, Levandowski is wrong when he claims that Uber has no evidence of the value of the
3 stock that was transferred to Waymo to settle the Waymo litigation. (Motion at 4-5.) Uber will present
4 evidence that the stock's value was \$250 million— [REDACTED]

5 [REDACTED] Uber will offer the
6 testimony of Cameron Poetzscher, Uber's vice-president of corporate development, who Mr.
7 Levandowski deposed as Uber's Rule 30(b)(6) witness on the Waymo Settlement Agreement. Uber
8 expects that Poetzscher will testify [REDACTED]

9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED] Poetzscher also will
16 testify that as adversaries in hotly contested litigation, the negotiations with Waymo were at arm's
17 length.

18 Additionally, the Waymo Settlement Agreement itself also is evidence that the settlement
19 consideration was worth \$250 million. [REDACTED]

20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED] Thus, the
26 Waymo Settlement Agreement itself is competent evidence of the value of the stock. *See, e.g., Dux*
27 *Cap. Mgmt. v. Chen*, No. C 03-00540 WHA, 2004 WL 1936309, at *13 (N.D. Cal. Aug. 31, 2004).

28 *Dux Capital Management* is instructive. In that case, defendants in a breach of fiduciary duty

1 suit argued that the plaintiff had failed to present any evidence that the corporation's stock had any
2 value at the time defendants breached their fiduciary duties. *Id.* The court held that a settlement
3 agreement resolving a different lawsuit in which the settling parties assigned a value of \$2 per share
4 to the corporation's stock was probative evidence of the stock's value because the parties to that
5 agreement arrived at the value in good faith and as a result of arm's length negotiations. *Id.* That is the
6 case here.

7 Further, [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]

13 The arbitration hearing transcript
14 is part of the discovery in this case and Levandowski's lawyers in this case represented him during the
15 arbitration hearing.

16 **Second**, Levandowski complains that there is no evidence to support Uber's contention that
17 Levandowski was primarily responsible for the conduct alleged in Waymo's lawsuit against Uber.
18 (Motion at 5-8.) Pointing to Waymo's opening statement, Levandowski argues that Waymo's
19 statements about what Uber did show Uber was at fault. (*Id.* at 6.) Opening statements are not evidence
20 and in any event, Uber is a corporation; it acts only through its employees. And in this case, that
21 employee was Levandowski. That is why Judge Alsup made a criminal referral about Levandowski
22 and Levandowski was indicted and convicted of theft of trade secrets. (*See United States v.*
23 *Levandowski*, 3:19-cr-00377-WHA (N.D. Cal.), Dkt. 77.)

24 As Levandowski himself admitted in his criminal case, "[a]lthough [he] was not a party to
25 Google/Waymo's lawsuit, *he was unquestionably at its center*" because "Google's case was premised
26 on its allegation that, when *Mr. Levandowski* chose to leave Project Chauffeur, *he* stole some 14,000
27 files, representing 'billions' of dollars in value, with the intent of replicating Google's LiDAR devices
28 at Uber." (*See id.* Dkt. 87 at 7 (emphasis added).) This admission, along with the evidence summarized
in Uber's *Trial Brief* [Dkt. 404], provides a basis for the Court to apportion at least 90% of the fault

1 to Levandowski.

2 **Third**, Levandowski claims that Uber has no evidence that Levandowski is responsible for
3 80% of the amount Uber paid to Google to settle the arbitration award’s joint and several judgment.
4 (Motion at 8-10.) To make his argument, Levandowski selectively (and misleadingly) quotes his own
5 interrogatory. Without alerting the Court that he asked only about the Waymo Settlement Agreement,
6 Levandowski argues that he asked Uber to provide the bases and support for its equitable
7 indemnification claim and complains that “Uber was silent on the Ron Indemnification Payment.”
8 (Motion at 8.) In fact, that interrogatory (which Uber quotes in full at page 3 *supra*) only asked Uber
9 to: “[e]xplain in detail the basis for Uber’s demand that Levandowski contribute to any payment made
10 by Uber *under the Waymo Settlement Agreement*” (Waymo Settlement Agreement, Motion, Ex. B
11 at 3 (emphasis added).) Having asked only about the basis for equitable indemnification for the
12 Waymo Settlement, it is disingenuous for Levandowski to suggest that, by not addressing the
13 Google/Ron settlement related to the Google arbitration, Uber must have no evidence to support its
14 contribution claim based on the Google arbitration award against Ron.

15 Equally disingenuous is Levandowski’s statement that he asked for all documents that support
16 Uber’s counterclaims and that “Uber produced nothing....” (Motion at 8.) This is false; if it were true,
17 surely Levandowski would have filed a motion to compel. The record shows he did not do so. The
18 reality is that Uber produced 2,077 documents to Levandowski, including certain documents related
19 to the Waymo settlement negotiations, and both parties had access to the very voluminous records
20 produced in the Waymo lawsuit and Google arbitration.

21 Moreover, as Levandowski’s argument demonstrates, the Arbitration Award itself is the
22 evidence that supports Uber’s equitable indemnification claim. (Motion at 9-10.) If, as Levandowski
23 argues, Ron and Levandowski were equal partners, at least 50% of the joint and several award is
24 attributable to Levandowski. (*Id.*) Given that admission, there is no basis for this Court to summarily
25 dismiss Uber’s equitable indemnification claim. Uber expects that when the Court hears all of the
26 evidence it will conclude that Levandowski was at least 80% responsible for the amounts Uber was
27 required to pay to Google.

1 **III. CONCLUSION**

2 For all of these reasons, Uber respectfully requests that this Court deny Levandowski's Motion
3 and grant such other relief as may be just.

4 Dated: February 7, 2022

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